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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 DONNA MARTINEZ,
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11 Plaintiff,

12 v.
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14 CAROLYN W. COLVIN, Acting
15 Commissioner of Social Security,
16

17 Defendant.

CV-15-3005-FVS

ORDER RE CROSS MOTIONS FOR
SUMMARY JUDGMENT

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19 **THIS MATTER** comes before the Court based upon the parties' cross
20 motions for summary judgment. The plaintiff is represented by Cory J. Brandt. The
21 defendant is represented by Jeffrey R. McClain. For the reasons set forth below, the
22 plaintiff's summary judgment motion is denied and the defendant's is granted.
23

24 **JURISDICTION**

25 On November 23, 2011, Donna Martinez applied for Title II disability
26 insurance benefits ("DIB"). She alleges that, by November 1, 2011, she had become
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disabled. (TR 10.) The Social Security Administration (“SSA”) denied her initial application, together with her request for reconsideration. On October 25, 2012, she asked for review of the SSA’s decision by an Administrative Law Judge (“ALJ”). She also applied for Title XVI supplemental security income (“SSI”). *Id.* The SSA scheduled an administrative hearing for July 31, 2013, and “escalated” her Title XVI claim “to the hearing level,” *id.*, so that both her Title XVI claim and her Title II claim were addressed at the hearing; a proceeding in which both Ms. Martinez and her attorney participated. *Id.* In the end, Ms. Martinez was unable to persuade the ALJ. On October 25, 2013, she ruled Ms. Martinez is not disabled for purposes of either Title II or Title XVI. Ms. Martinez asked the Appeals Council to review the ALJ’s decision, but, on December 15, 2014, the Appeals Council decided not to do so. At that point, the ALJ’s decision became the final decision of the Commissioner. 20 C.F.R. §§ 404.900(a)(5), 416.1400(a)(5). Ms. Martinez commenced this action on January 7, 2015. 42 U.S.C. §§ 405(g), 1383(c). Both she and the Commissioner move for summary judgment.

BACKGROUND

Donna Martinez was born on November 28, 1962. (TR 284.) Over the years, she has worked as a cook, a home-care provider, a casino security officer, and a flagger. (TR 22.) She alleges she is no longer able to work because she suffers from long-standing physical and mental impairments. As explained more fully below, they

1 include cirrhosis, diabetes, degenerative disc disease, anxiety and depression. *Id.*
2 The ALJ acknowledged she suffers from serious physical and mental impairments.
3 (TR 18.) The issue is the extent to which Ms. Martinez's impairments limit her
4 ability to work. After examining the evidence, the ALJ determined Ms. Martinez is
5 capable of working either as a casino security officer or as a flagger. In making that
6 determination, the ALJ discounted Ms. Martinez's description of her limitations. (TR
7 19-21.) Not only that, but also the ALJ discounted the evaluations of a physician, a
8 nurse, and a psychologist. All three had issued pessimistic assessments of Ms.
9 Martinez's ability to work. *Id.* Ms. Martinez disagrees with the ALJ's decision to
10 discount their assessments. According to Ms. Martinez, the ALJ failed to provide
11 adequate reasons for doing so.

15 **ALJ'S DECISION**

16 A person is disabled "if [s]he is unable to engage in any substantial gainful
17 activity by reason of any medically determinable physical or mental impairment
18 which can be expected to result in death or which has lasted or can be expected to last
19 for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A).
20 The SSA has established a five-step process for evaluating a disability claim. 20
21 C.F.R. § 416.920(a)(4). If, at any step, an ALJ can determine the claimant is disabled
22 (or not disabled), the ALJ will do so. *Id.* In that event, the ALJ will not proceed to
23 the next step. *Id.* The process is complete.

1 A. Step One

2 At step one, Ms. Martinez had to show she is not engaged in “substantial
3 gainful activity.” 20 C.F.R. § 404.1520(a)(4)(i). The term “[s]ubstantial gainful
4 activity means work that . . . [i]nvolves doing significant and productive physical or
5 mental duties; and (b) [i]s done (or intended) for pay or profit.” 20 C.F.R. § 416.910.
6 The ALJ found she has not engaged in any substantial gainful activity since
7 November 1, 2011, which is the date upon which disability allegedly began. (TR 12.)
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9 B. Step Two

10 At step two, Ms. Martinez had to show she has “a severe medically
11 determinable physical or mental impairment that meets the duration requirement in §
12 416.909, or a combination of impairments that is severe and meets the duration
13 requirement[.]” 20 C.F.R. § 416.920(a)(4)(ii). An impairment is “severe” if it
14 “significantly limits” the claimant’s “physical or mental ability to do basic work
15 activities.” 20 C.F.R. § 416.920(c). The ALJ found Ms. Martinez suffers from a
16 number of severe physical and mental impairments, *viz.*, “degenerative disc disease of
17 the cervical spine, chronic liver disease and cirrhosis, diabetes, osteoarthritis and
18 allied disorders, an affective disorder, and an anxiety-related disorder.” (TR 12.)
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20 C. Step Three

21 At step three, the ALJ considered whether Ms. Martinez’s impairments are so
22 severe she is conclusively presumed to be disabled. *See Reddick v. Chater*, 157 F.3d
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1 715, 721 (9th Cir.1998). Resolution of the issue turns upon whether Ms. Martinez
 2 has any impairment, or combination of impairments, that equals an impairment that is
 3 listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. §§ 416.920(a)(iii),
 4 416.925(a). See *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1194 (9th
 5 Cir.2004). SSA regulations state:

6 The Listing of Impairments (the listings) is in appendix 1 of subpart P of
 7 part 404 of this chapter. For adults, it describes for each of the major
 8 body systems impairments that . . . [the SSA considers] to be severe
 9 enough to prevent an individual from doing any gainful activity,
 10 regardless of his or her age, education, or work experience.

11 20 C.F.R. § 416.925(a). “When a claimant meets or equals a listing, ‘he is presumed
 12 unable to work and is awarded benefits without a determination whether he actually
 13 can perform his own prior work or other work.’” *Kennedy v. Colvin*, 738 F.3d 1172,
 14 1176 (9th Cir.2013) (quoting *Sullivan v. Zebley*, 493 U.S. 521, 532, 110 S.Ct. 885,
 15 107 L.Ed.2d 967 (1990)). The claimant bears the burden of proof at step three.
 16 *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir.2012). The ALJ decided Ms.
 17 Martinez failed to establish a conclusive presumption of disability.

18 D. Step Four

19 At step four, the ALJ evaluated whether Ms. Martinez can perform her “past
 20 relevant work” given her “residual functional capacity.” 20 C.F.R. §
 21 416.920(a)(4)(iv). The SSA defines “past relevant work” as work that “was done

within the last 15 years, lasted long enough for you to learn to do it, and was substantial gainful activity.” 20 C.F.R. § 416.965(a). Ms. Martinez’s residual functional capacity (“RFC”) is the most she can do in a work setting despite her physical and mental limitations. 20 C.F.R. § 416.945(a)(1). In assessing Ms. Martinez’s RFC, the ALJ had to consider “all of the relevant medical and other evidence.” 20 C.F.R. § 404.1545(a)(3). Among other things, the ALJ considered her testimony and the records that were admitted into evidence (which included the observations of a number of health care providers and mental health professionals).

(TR 17-21.) The ALJ found:

[T]he claimant has the residual functional capacity to perform light work as defined in 20 CFR 404.1567(b) and 416.967(b). She can lift up to 20 pounds occasionally, lift or carry up to 10 pounds frequently, stand or walk for approximately 6 hours per eight hour day and sit for approximately 6 hours per eight hour day with normal breaks; pushing or pulling is limited to 20 pounds; she can occasionally climb ramps or stairs; never climb ladders ropes or scaffolds; occasionally balance, stoop, kneel, crouch, and crawl; perform occasional overhead reaching and frequent fingering; she should avoid concentrated exposure to extreme cold, extreme heat, excessive vibration, pulmonary irritants such as fumes, odors, and gases and workplace hazards such as dangerous machinery and unprotected heights; she can perform relatively unskilled or low semiskilled jobs and well learned tasks, not to exceed an SVP three.

1 (TR 17.) This is Ms. Martinez's RFC. Having made this determination, the ALJ had
2 to complete the Step-Four analysis by deciding whether Ms. Martinez can perform
3 her past relevant work. A vocational expert addressed this issue at the administrative
4 hearing. She opined that, in light of Ms. Martinez's RFC, she is capable of working
5 as either a casino security officer and a flagger. (TR 53.) The ALJ credited the
6 vocational expert's opinion, finding Ms. Martinez is capable of performing some past
7 relevant work. (TR 22.) The ALJ's finding was dispositive. A person who is
8 capable of performing past relevant work is not disabled. *Id.* Given this
9 determination, it was unnecessary for the ALJ to proceed to Step Five, and she did
10 not do so.
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12 **STANDARD OF REVIEW**
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14 A district court has "power to enter, upon the pleadings and transcript of the
15 record, a judgment affirming, modifying, or reversing the decision of the
16 Commissioner of Social Security, with or without remanding the cause for a
17 rehearing." 42 U.S.C. § 405(g). However, review is limited. "The findings of the
18 Commissioner of Social Security as to any fact, if supported by substantial evidence,
19 shall be conclusive[.]" *Id.* As a result, the Commissioner's decision "will be
20 disturbed only if it is not supported by substantial evidence or it is based on legal
21 error." *Green v. Heckler*, 803 F.2d 528, 529 (9th Cir.1986). "Substantial evidence"
22 means more than a mere scintilla, . . . but less than a preponderance." *Desrosiers v.*
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1 *Sec'y of Health & Human Servs.*, 846 F.2d 573, 576 (9th Cir.1988) (internal
2 punctuation and citations omitted).

3 **PLAINTIFF'S OBJECTIONS**

4 Ms. Martinez insists the ALJ's Step-Four analysis is flawed. It was at that step
5 the ALJ determined her residual functional capacity (*i.e.*, the most she can do in a
6 work setting despite her physical and mental limitations). See 20 C.F.R. §
7 416.945(a)(1). As observed earlier, the ALJ discounted Ms. Martinez's testimony
8 and the opinions of several professionals who had submitted pessimistic assessments
9 of her ability to work. Ms. Martinez alleges the ALJ failed to provide adequate
10 reasons for discounting the disputed evidence.

11 **MS. MARTINEZ**

12 Ms. Martinez testified she suffers from chronic pain. (TR 39-43.) The ALJ
13 discounted her testimony in that regard because there were instances in which she did
14 not complain of pain to a health care provider. Ms. Martinez challenge's the ALJ's
15 reasoning. While Ms. Martinez concedes she did not report pain on every visit to a
16 health care provider, she notes there were many occasions on which she was driven to
17 a hospital by severe, unrelenting pain. As she sees it, the fact her pain may occur
18 intermittently does not mean either that it is insignificant or that it is not disruptive.

19 The standard for evaluating a claimant's credibility is well established. Where,
20 as here, there is no evidence of malingering, "the ALJ may reject the claimant's
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1 testimony regarding the severity of her symptoms only if [the ALJ] makes specific
2 findings stating clear and convincing reasons for doing so.” *Smolen v. Chater*, 80
3 F.3d 1273, 1283 (9th Cir.1996). Had Ms. Martinez reported that she suffered from
4 intermittent pain, her objection to the ALJ’s treatment of her testimony would be far
5 more persuasive. However, Ms. Martinez testified she suffers from chronic,
6 debilitating pain. (TR 39-44.) Given the sweeping nature of Ms. Martinez’s
7 description of her pain, the ALJ properly noticed there were several instances in
8 which she did not complain of pain to health care providers when one would have
9 expected her to have done so had she been experiencing the excruciating pain she
10 described during her testimony.

14 Two other circumstances appear to have figured in the ALJ’s decision to
15 discount Ms. Martinez’s testimony. One was her failure to comply fully with the
16 treatment prescribed by her physicians. Ms. Martinez has diabetes. It is imperative
17 she take insulin, and yet, there have been extended periods when she has failed to do
18 so. Ms. Martinez acknowledges as much, but she insists the lapse may have been the
19 result of an impaired memory. She submits the ALJ should have investigated this
20 possibility.

23 Another circumstance that figured in the ALJ’s assessment of Ms. Martinez’s
24 credibility was the fact she did not seek mental health treatment until the State of
25 Washington’s Department of Social and Health Services notified her she had to start
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treatment in order to continue receiving state-funded benefits. Ms. Martinez argues
1 her failure to seek mental-health treatment should not be held against her. As she
2 points out, mental illness can have a paralyzing effect. This is a phenomenon the
3 Ninth Circuit has recognized. *Cf. Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th
4 Cir.1996) (an ALJ should be slow to “to chastise one with a mental impairment for
5 the exercise of poor judgment in seeking rehabilitation” (quoting *Blankenship v.*
6 *Bowen*, 874 F.2d 1116, 1124 (6th Cir.1989))).
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Ms. Martinez makes a number of important points in her memoranda. Without
9 question, an ALJ must proceed with caution when considering a claimant’s failure to
10 comply with the treatment her physician has recommended; just as an ALJ must
11 proceed with caution when considering a claimant’s failure to seek mental-health
12 treatment. In this case, the ALJ appears to have respected the need for caution.
13 While she cited Ms. Martinez’s failure to take insulin at various times, and while she
14 cited the prompting Ms. Martinez received from the Department of Social and Health
15 Services, the ALJ does not appear to have assigned undue weight to circumstances.
16 Rather, she considered those circumstances in light of the record as a whole as she
17 evaluated Ms. Martinez’s credibility.
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Reasonable people may disagree with respect to the ALJ’s to discount Ms.
23 Martinez’s testimony regarding chronic pain Nevertheless, as the ALJ observed, the
24 record reflects Ms. Martinez’s reports of pain were inconsistent. On some occasions
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she reported severe pain; on others she did not. The inconsistency in her reporting of pain tends to undermine her allegation she suffers from chronic pain. Thus, the ALJ had a factual basis for discounting Ms. Martinez's testimony. While the evidence upon which the ALJ relied may not satisfy a preponderance-of-the evidence standard, it is more than a mere scintilla of evidence, which is what the relevant statute requires to uphold an ALJ's findings. *See Desrosiers*, 846 F.2d at 576.

MARY PELLICER, M.D.

The State of Washington's Disability Determination Services arranged for Dr. Pellicer to examine Ms. Martinez. The examination took place on May 22, 2012. Dr. Pellicer was pessimistic. She concluded Ms. Martinez's physical impairments would sharply limit her ability to function in a workplace. (TR 289.) For example, Dr. Pellicer wrote that Ms. Martinez would be unable to stand for long periods of time. She would be unable to lift, carry or bend, and she would need frequent breaks. *Id.* The ALJ discounted Dr. Pellicer's assessment of Ms. Martinez's physical limitations. In essence, the ALJ provided three reasons: (1) her lumbosacral x-rays were normal; (2) she exhibited virtually undiminished strength in her extremities; and (3) she reported being able to perform basic household chores, including making beds and mowing the lawn. (TR 20.)

Ms. Martinez alleges the ALJ's explanation is inadequate. As Ms. Martinez points out, Dr. Pellicer was an examining physician. *See Lester v. Chater*, 81 F.3d

1 821, 830 (9th Cir.1995). The fact Dr. Pellicer examined Ms. Martinez means her
2 assessment is entitled to considerable weight. The ALJ was authorized to discount
3 the assessment only if the ALJ stated clear and convincing reasons for doing so.
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Regennitter v. Comm'r. of Soc. Sec. Admin., 166 F.3d 1294, 1298 (9th Cir.1999). In
5 Ms. Martinez's opinion, the ALJ's reasons for discounting Dr. Pellicer's assessment
6 are neither clear nor convincing. To begin with, Ms. Martinez maintains the x-rays
7 were inconclusive. Some parts of her spine appeared normal in the x-rays; other parts
8 displayed degenerative change. Next, Ms. Martinez maintains the ALJ placed
9 unwarranted emphasis on the existence of strength in her extremities. According to
10 Ms. Martinez, Dr. Pellicer was aware of the strength she possessed and yet her
11 assessment was pessimistic. Finally, there is the matter of household chores. Ms.
12 Martinez maintains that none of the reported activities requires significant lifting,
13 bending, or carrying.

14 The defendant argues the ALJ's decision to discount Dr. Pellicer's proposed
15 limitations was appropriate. The defendant focuses upon the limitations Dr. Pellicer
16 proposed. Some of them -- *e.g.*, no lifting, carrying or bending -- are extreme. It is
17 difficult to square such limitations with some of the activities Ms. Martinez said she
18 was able to perform. For example, on or about March 28, 2012, Ms. Martinez
19 submitted a report indicating she was capable of performing certain household
20 chores. The chores included "cleaning, laundry, mowing, dishes." (TR 200.)
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Contrary to Ms. Martinez, all of the listed activities typically involve some lifting,
carrying or bending. For example, operating a lawn mower can be a fairly
demanding activity. Much depends, of course, upon the type of lawn mower and the
size of the lawn. Nevertheless, a person who can mow a lawn should be able to do
some lifting, carrying, or bending. The same is true of a person who can clean her
house, do her laundry, and wash dishes. That being the case, says the defendant, the
limitations that Dr. Pellicer recommended were inconsistent with the activities Ms.
Martinez reported, and, in defendant's opinion, it was entirely proper for the ALJ to
consider the inconsistency when weighing Dr. Pellicer's recommendations. All the
more so, says the defendant, given the undisputed strength in Ms. Martinez's
extremities. Finally, there is the fact the x-rays of the lumbosacral vertebrae did not
reveal degenerative disc disease. While the x-rays of two cervical vertebrae did
reveal "degenerative changes," the degeneration did not appear to be "acute or
severe." (TR 20.) The ALJ was surprised Dr. Pellicer did not address the equivocal
nature of the spinal x-rays.

The ALJ's written opinion reflects a careful review of the record. In the end,
she could not reconcile Dr. Pellicer's pessimistic assessment of Ms. Martinez with
either the unexplained results of the spinal x-rays, or with Ms. Martinez's undisputed
strength in her extremities, or with the activities she reportedly engaged in. Granted,
the ALJ is not a physician -- Dr. Pellicer is. That said, an Administrative Law Judge

1 is charged with the responsibility of reviewing medical evidence. Here, the ALJ
2 engaged in deferential review, but she was troubled by the inconsistencies she
3 observed. She could not reconcile Dr. Pellicer's conclusion with the evidence as a
4 whole. Since the inconsistencies that troubled the ALJ are present in the record, and
5 since the ALJ's concerns are supported by substantial evidence, she had a clear and
6 convincing basis for discounting Dr. Pellicer's conclusion.
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8 **JULIET CAPP, ARNP**
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10 Juliet Capp is an Advanced Registered Nurse Practitioner who provided basic
11 medical care to Ms. Martinez. She submitted two reports during the fall of 2012
12 concerning Ms. Martinez's physical limitations. (TR 308; TR 321.) The ALJ
13 discounted important parts of both reports. ARNP Capp prepared the first of the two
14 reports during September of 2012. She was aware of the evaluation Dr. Pellicer
15 performed four months earlier and she cited it with approval. (TR 322.) However, in
16 contrast to Dr. Pellicer, she opined during September that Ms. Martinez was capable
17 of performing "medium work," which includes lifting up to 50 pounds. (TR 323.)
18 The ALJ noted the inconsistency between Dr. Pellicer's assessment and ARNP
19 Capp's. (TR 21.) In view of the ARNP Capp's determination that Ms. Martinez
20 could perform medium work, the September assessment is of little use to Ms.
21 Martinez. The November assessment is much more helpful. In it, ARNP Capp
22 opined Ms. Martinez is limited to "[l]ess than sedentary work." (TR 309.) The ALJ
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1 was unpersuaded. “I discount her opinion,” wrote the ALJ, “based on the objective
2 medical evidence, the claimant’s activities, and evidence that the claimant tends to
3 overstate her symptoms as discussed above.” (TR 21.) As Ms. Martinez points out,
4 this statement is vague. One must review other sections of the ALJ’s opinion in order
5 to understand what she meant.

7 ARNP Capp examined Ms. Martinez on a number of occasions during 2012
8 and 2013. Several aspects of those examinations are worth noting. During January
9 of 2013, ARNP Capp reported Ms. Martinez “was well-developed, well-nourished,
10 healthy appearing, and in no apparent distress.” (TR 14.) The same was true during
11 July of that year. Id. Given the absence of distress during the January and July
12 examinations, the ALJ properly questioned whether ARNP Capp’s pessimistic
13 assessment of November of 2012 was supported by objective medical evidence.
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17 The ALJ had at least one other reason to question ARNP Capp’s pessimistic
18 assessment; namely, she relied heavily upon Ms. Martinez’s description of symptoms
19 and Ms. Martinez had a tendency to overstate her symptoms. Ms. Martinez’s
20 complaints of chronic pain are instructive. As the ALJ noted, Ms. Martinez suffers
21 from medical conditions that can produce severe pain, and Ms. Martinez insists she
22 must cope with chronic pain. However, on a number of occasions, she did not report
23 pain to the medical health professional who was examining her. (TR 19.) One would
24 have expected, observed the ALJ, that a person who is experiencing severe pain
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would report the pain to her physician. (TR 19.) The fact Ms. Martinez did not report pain to health care providers during the course of at least two examinations suggests her pain is not chronic; that is to say, she has a tendency to overstate her symptoms. Given such a tendency, especially when combined with the existence of examinations in which Ms. Martinez appeared to be doing reasonably well, it was appropriate for the ALJ to discount ARNP Capp's pessimistic assessment. Ms. Martinez complains the ALJ's explanation is vague, but her criticism is unfair. When one looks at the ALJ's opinion as a whole, one can identify the reasons she relied upon. They are rooted in the record, and they rest upon substantial evidence.

AARON BURDGE, Ph.D.

Psychologist Aaron Burdge performed an evaluation on September 13, 2012. He diagnosed depression and anxiety. (TR 329.) He determined Ms. Martinez's psychological problems would limit her ability to function in the workplace. (TR. 29-30.) The ALJ discounted Dr. Burdge's assessment because he relied heavily upon Ms. Martinez's description of her symptoms (a description the ALJ thought was unreliable) and because Ms. Martinez apparently responded successfully to counseling during 2013. (TR 21.) Ms. Martinez objects to the ALJ's treatment of Dr. Burdge's assessment. She notes, correctly, that a psychological evaluation will almost invariably depend upon information that is supplied by the patient and that psychologists are trained to evaluate the information their patients provide.

Furthermore, Ms. Martinez insists the ALJ overstated the extent to which she recovered from depression and anxiety. The defendant disagrees. She cites a progress note that was prepared by a therapist at Central Washington Comprehensive Mental Health on July 12, 2013. The therapist wrote, “Donna’s depression is improving her [sic] PHQ-9 as [sic] decreased by 9 points.” (TR 445.) In view of Ms. Martinez’s progress in therapy, the ALJ had a reasoned basis for discounting Dr. Burdge’s pessimistic assessment.

CONCLUSION

Ms. Martinez’s request for disability benefits is a close call. A different ALJ might have reached the opposite result on the same record. However, that does not mean the Court can, much less should, reverse her decision. A reviewing court should not substitute its assessment of the evidence for the ALJ’s. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir.1999). To the contrary, a reviewing court must defer to an ALJ’s assessment as long as it is supported by substantial evidence. 42 U.S.C. § 405(g). While the evidence in this case is not overwhelming, the Court is satisfied the ALJ offered clear and convincing reasons for her ruling.

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1 **IT IS HEREBY ORDERED:**

- 2 1. The plaintiff's motion for summary judgment (**Ct. Rec. 12**) is **denied**.
3 2. The defendant's motion for summary judgment (**Ct. Rec. 14**) is **granted**.

4 **IT IS SO ORDERED.** The District Court Executive is hereby directed to file
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6 this Order, enter judgment accordingly, furnish copies to counsel, and close the case.

7 **DATED** this 17th day of December, 2015.
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10 s/Fred Van Sickle
11 FRED VAN SICKLE
12 Senior United States District Judge
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